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April 10, 2017

TORRUELLA, Circuit Judge. Appellant, the Wampanoag Tribe of Gay Head (Aquinnah)¹ (the "Tribe"), a federally recognized Indian tribe, seeks to have gaming pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, on its trust lands in Dukes County, Massachusetts (the "Settlement Lands"). Appellees, the Commonwealth of Massachusetts (the "Commonwealth"), the town of Aquinnah (the "Town") and the Aquinnah/Gay Head Community Association² argue that any gaming on the Settlement Lands should be subject to state, rather than federal, laws and regulations. The district court, on summary judgment, found for the Appellees. The district court reasoned that IGRA did not apply, because the Tribe had failed to exercise sufficient governmental power; and that even if the Tribe had exercised sufficient governmental power, the Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, Pub. L. No. 100-95 (codified at 25 U.S.C. §§ 1771-1771i) (the "Federal Act"), which provides that the Settlement Lands are subject to state laws and regulations (including gaming laws and regulations), governed. Because we find that the Tribe has exercised more than sufficient

¹ The town of Gay Head was incorporated into the Commonwealth of Massachusetts in 1870, but has since been renamed "Aquinnah."

² Because the Town and the Association filed a joint brief, we generally refer to both parties together as "the Town."

A. Factual History

The Tribe has lived on Martha's Vineyard since before the European colonization of New England, and has continued to reside there to the present day. The Town was incorporated by the Commonwealth in 1870 as the town of Gay Head, and has since been renamed Aquinnah. In 1974, the Tribe sued the Town in federal court, asserting title to certain lands and "seeking ejectment of record title holders." The Commonwealth and the Association intervened.

In November 1983, these parties signed a Memorandum of Understanding (the "Settlement Agreement"). The Settlement Agreement conveyed the Settlement Lands (approximately 485 acres) to the Tribe. In exchange, the Tribe gave up its claims to other lands and dismissed its lawsuit. Before this Settlement Agreement could enter into force, it had to be implemented by Congress.

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Pub. L. No. 100-95 (codified at) 25 U.S.C. §§ 1771-1771i. The Federal Act provides, inter alia, that the Settlement Lands "shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth . . . and the [Town] . . . (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance)." 25 U.S.C. § 1771g.

The parties all agree that "[t]he Commonwealth, the Town, and the Tribe have each exercised jurisdiction over the Settlement Lands pursuant to the provisions of the Federal Act."

2. Cabazon and IGRA

On February 25, 1987 -- approximately six months before Congress passed the Federal Act -- the Supreme Court decided California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), which held that California -- which permitted certain forms of regulated gambling -- could not civilly regulate tribal bingo games because such regulation "would impermissibly infringe on tribal government." Id. at 221-22. This decision did, however, leave space for states that criminally prohibit gaming to prohibit it on Indian lands within their jurisdictions.

In response, on October 17, 1988, Congress enacted IGRA. See, e.g., Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2034 (2014) ("Congress adopted IGRA in response to [Cabazon], which

3. The Tribe's Pursuit of Gaming on Settlement Lands

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Ordinance No. 2011-01 to the NIGC for approval, which set forth tribal rules governing gaming. On February 4, 2012, the Tribe adopted Gaming Ordinance No. 2011-01, and on February 21, 2012, the NIGC "announc[ed] the approval of Gaming Ordinance No. 2011-01 for gaming on Indian Lands as defined by IGRA." On March 5, 2012, the Tribe began corresponding with the Commonwealth to enter into negotiations for a Class III compact under the newly-enacted law, but no compact was formed.

On May 30, 2013, the Tribe submitted an amended Ordinance No. 2011-01 to the NIGC, which stated the Tribe's intention to pursue Class II gaming on the Settlement Lands. The NIGC sought an opinion from the Department of the Interior ("DOI") as to whether the Federal Act prohibited Class II gaming on the Settlement Lands; the DOI provided an opinion stating that gaming was not prohibited. On August 29, 2013, the NIGC approved the amended Ordinance No. 2011-01. On October 25, 2013, in response to a request by the Tribe, the NIGC provided an opinion that the Settlement Lands were eligible for gaming under IGRA. Consequently, the Tribe has neither applied for nor obtained a license from the Massachusetts Gaming Commission to operate a gaming establishment.

When the Tribe informed the Commonwealth that it would proceed with the establishment of a Class II gaming facility on

the Settlement Lands pursuant to IGRA, the Commonwealth responded, on December 2, 2013, by filing suit against the Tribe in state court. The Commonwealth asserted breach of the Settlement Agreement and sought a declaratory judgment that the Settlement Agreement prohibited gaming on the Settlement Lands. The Tribe removed the case to the district court on December 30, 2013, on grounds of federal question and supplemental jurisdiction.

After some procedural fencing not relevant here, on May 28, 2015, the parties all moved for summary judgment. On November 13, 2015, the district court granted summary judgment for the Appellees.

The district court ruled that the Settlement Lands were not covered by IGRA, and hence were subject to the Commonwealth's gaming regulations. Massachusetts v. Wampanoag Tribe of Gay Head (AQUINNAH), 144 F. Supp. 3d 152, 177 (D. Mass. 2015). First, it found that the Tribe, despite having jurisdiction over the Settlement Lands, failed to exercise sufficient "governmental power" over those lands, as required for IGRA to apply. Id. It recognized that the Tribe had asserted that it was "responsible" for many governmental services in the Settlement Lands, but found that it had not shown sufficient "actual manifestations of [the Tribe's] authority." Id. at 169-70. Second, it ruled that even if the Tribe did exercise sufficient governmental power, IGRA did

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II. Standard of Review

A district court's grant of summary judgment is reviewed de novo. OneBeacon Am. Ins. Co. v. Commercial Union Assurance Co. of Can., 684 F.3d 237, 241 (1st Cir. 2012). Summary judgment should be granted if "there is no genuine dispute as to any material fact" and the movant "is entitled to judgment as a matter of law." Id. (quoting Fed. R. Civ. P. 56(a)).

III. Discussion

We must resolve two issues today. First, we must decide whether IGRA applies to the Settlement Lands. See Narragansett, 19 F.3d at 702-03. Second, we must decide whether IGRA effects a repeal of the Federal Act.³ See id. at 703-04.

A. **The Applicability of IGRA**

[IGRA]'s key provisions [apply] to "[a]ny Indian tribe having jurisdiction over Indian lands," or, stated differently, to "Indian lands within such tribe's

³ The Tribe also raises a third issue, whether the district court abused its discretion by not including the NIGC as a required party. A party is required to be joined if the absence of that party could "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations." Fed. R. Civ. P. 19(a)(1)(B)(ii). In determining whether there is a risk of inconsistent obligations under Rule 19(a)(1)(B)(ii), we consider whether there is a "practical" possibility of such an inconsistency, not whether it may be "theoretically possible." Bacardí Int'l. Ltd. v. V. Suárez & Co., 719 F.3d 1, 13 (1st Cir. 2013). Although the Tribe asserts that it may become subject to inconsistent obligations, the Tribe has failed to provide any examples of such inconsistent obligations. We thus find no error, let alone abuse of discretion, in the district court's decision to proceed without the NIGC as a party.

jurisdiction." See 25 U.S.C. §§ 2710(d)(3)(A), 2710(b)(1). These are dual limitations, for one element of the definition of "Indian lands" requires that an Indian tribe "exercise[] governmental power" over them. 25 U.S.C. § 2703(4).

Narragansett, 19 F.3d at 701 (third and fourth alterations in original).

1. Having Jurisdiction⁴

In Narragansett, we were satisfied by the fact that Rhode Island did not acquire "exclusive" jurisdiction, and that the Narragansett Tribe retained "that portion of jurisdiction they possess by virtue of their sovereign existence as a people." Id. at 702. In the present case, as the district court noted, the parties stipulated that "the Commonwealth, the Town, and the Tribe have each exercised jurisdiction over the Settlement Lands." Although the Federal Act does contain some language limiting the Tribe's jurisdiction, that language only confirms that the Tribe retains the jurisdiction it has not surrendered in the Federal Act. 25 U.S.C. § 1771e(a) (stating that the Tribe "shall not have any jurisdiction over nontribal members and shall not exercise any jurisdiction over any part of the [S]ettlement [L]ands in contravention of [the Federal Act], the civil regulatory and

⁴ The Tribe argues that Appellees have waived arguments on this issue. Because we find for the Tribe on the merits, we need not address its waiver argument.

[A] tribe must exercise governmental power in order to trigger [IGRA]. Meeting this requirement does not depend upon the Tribe's theoretical authority, but upon the presence of concrete manifestations of that authority. Consequently, an inquiring court must assay the jurisdictional history of the settlement lands.

In Narragansett, we noted that this "inquiry into governmental power need not detain us," and concluded that the Narragansett Tribe's "activities adequately evince that the Tribe exercises more than enough governmental power to satisfy the second prong of the statutory test." Id. at 703. To wit, the Narragansett Tribe

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has taken many strides in the direction of self-government. It has established a housing authority, recognized as eligible to participate in the Indian programs of the federal Department of Housing and Urban Development, see 24 C.F.R., Part 905 (1993). It has obtained status as the functional equivalent of a state for purposes of the Clean Water Act, after having been deemed by the Environmental Protection Agency as having "a governing body carrying out substantial governmental duties and powers," 33 U.S.C. § 1377(e) (1988), and as being capable of administering an effective program of water regulation, see 40 C.F.R. § 130.6(d) (1993). It has taken considerable advantage of the Indian Self-Determination and Education Assistance Act (ISDA), a statute specifically designed to help build "strong and stable tribal governments." 25 U.S.C. § 450a(b) (1998). The Tribe administers health care programs under an ISDA pact with the Indian Health Service, and, under ISDA contracts with the Bureau, administers programs encompassing job training, education, community services, social services, real estate protection, conservation, public safety, and the like.

Id.

The Tribe in the present case has taken most of the same steps that the Narragansetts had -- and indeed several more. Therefore, like in Narragansett, the inquiry into governmental power "need not detain us." Id.

In the present case, like in Narragansett, the Tribe: has established a housing program that receives HUD assistance, and has built approximately 30 units of housing under that program; has entered into an intergovernmental agreement with the EPA; operates a health care clinic with the aid of the Indian Health Service; administers a program for education with scholarships

financed with Bureau of Indian Affairs funding; administers social services with a human services director responsible for child welfare work; administers conservation policy (and has two conservation rangers to enforce its conservation policy); and administers a public safety program (the same two rangers enforce tribal laws and can be cross-deputized by the Town).

In addition, the Tribe has passed numerous ordinances and employs a judge. These ordinances deal with such diverse topics as building codes, health, fire, safety, historic preservation, fish, wildlife, natural resources, housing, lead paint, elections, judiciary, criminal background checks, and the reporting of child abuse and neglect. In addition to the inter-governmental agreements already mentioned -- with the EPA and the Bureau of Indian Affairs -- the Tribe has also entered into intergovernmental agreements with the National Park Service, and indeed also with the Commonwealth and the Town. The agreements with the Commonwealth and the Town include agreements whereby the Tribe, for compensation, may rely on state and local law enforcement and firefighting services.

The Town nevertheless urges us to adopt the district court's analysis and find that the Tribe has not exercised sufficient governmental power. The Town points out that some of the Tribe's exercises of governmental power are not full-fledged,

and then proceeds to read our opinion in Narragansett as requiring full-fledged exercise of governmental power for IGRA to apply. For instance, the Town points out that while the Tribe employs a judge -- and indeed maintains a tribal court -- this judge is employed part-time, and presides via teleconference from Washington State; similarly, the Town points out that the Tribe does not have a hospital, but instead maintains a health clinic.

The Town gets it backwards. Pursuant to IGRA, "the operation of gaming by Indian tribes [is] a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702. The Town now seeks to put this logic on its head by requiring the Tribe's government to be fully developed before it can have the benefit of gaming revenue. This is not what IGRA requires, nor is it our case law. In Narragansett, we deemed the "many strides in the direction of self-government" -- that is, not the achievement of full-fledged self-governance, but merely movement in that direction -- to "evince that the Tribe exercises more than enough governmental power to satisfy the second prong of the statutory test." 19 F.3d at 703. We have no difficulty drawing the same conclusion here, especially because "[i]n determining [Congressional] intent . . . [d]oubtful expressions are to be resolved in favor of [Indians]." Id. at 691

(citations omitted) (quoting Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586-87 (1977)).⁶

B. The Interface between IGRA and the Federal Act

Having determined that IGRA applies to the Settlement Lands, we must now determine whether IGRA effected a partial repeal of the Federal Act. "The proper mode of analysis for cases that involve a perceived conflict between two federal statutes is that of implied repeal." Id. at 703 (citing United States v. Cook, 922 F.2d 1026, 1033 (2d Cir. 1991)). "[I]mplied repeals of federal statutes are disfavored. In the absence of a contrary legislative command, when two acts of Congress touch upon the same subject matter the courts should give effect to both, if that is feasible." Id. (citing Pipefitters Local 562 v. United States, 407 U.S. 385, 432 n.43 (1972)). "[S]o long as the two statutes, fairly construed, are capable of coexistence, courts should regard each as effective." Id. (citing Traynor v. Turnage, 485 U.S. 535, 547-48 (1988)). But "'if the two [acts] are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first.'" Id.

6 The Tribe also argues that the determinations the NIGC and DOI made concerning the applicability of IGRA to the Settlement Lands merit our deference. Because we find for the Tribe on the merits of its own legal arguments, we do not reach the question of how much, if any, deference the NIGC and DOI determinations merit.

(quoting United States v. Tynen, 78 U.S. 88, 92 (1870)). Finally, "[e]ven absent outright repugnancy, a repeal may be implied in cases where the later statute covers the entire subject 'and embraces new provisions, plainly showing that it was intended as a substitute for the first act.'" Id. at 703-04 (quoting Tynen, 78 U.S. at 92).

"The doctrine of implied repeal operates without special embellishment in the Indian law context. The rationale for encouraging preemption in the Indian context -- that the federal government is a more trustworthy guardian of Indian interests than the states -- has no relevance to a conflict between two federal statutes." Id. at 704 (internal citations omitted).

Two precedents guide our analysis of the present issue: Narragansett, 19 F.3d 685 (holding that the Rhode Island Settlement Act was impliedly repealed in relevant part by IGRA, id. at 705), and Passamaquoddy Tribe v. Maine, 75 F.3d 784 (1st Cir. 1996) (holding that the Maine Settlement Act was not repealed by IGRA). Because the present case is very close to Narragansett, and readily distinguished from Passamaquoddy, we find for the Tribe on this issue.

The Rhode Island Settlement Act at issue in Narragansett read, in relevant part, "[e]xcept as otherwise provided in this subchapter, the settlement lands shall be subject to the civil and

criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. § 1708 (1978). We found that this settlement act and IGRA "are partially but not wholly repugnant." Narragansett, 19 F.3d at 704. The two laws clashed only as to class I and class II gaming (because IGRA permits class III gaming only if the tribe and the state reach a compact), which "leaves largely intact the grant of jurisdiction [to the state] -- but it demands an adjustment of that portion of jurisdiction touching on gaming." Id. We highlighted two reasons why IGRA trumped the Rhode Island Settlement Act:

First, the general rule is that where two acts are in irreconcilable conflict, the later act prevails Second, . . . courts should endeavor to read antagonistic statutes together in the manner that will minimize the aggregate disruption of congressional intent. Here, reading the two statutes to restrict state jurisdiction over gaming honors [IGRA] and, at the same time, leaves the heart of the [Rhode Island] Settlement Act untouched. Taking the opposite tack -- reading the two statutes in such a way as to defeat tribal jurisdiction over gaming on the settlement lands -- would honor the Settlement Act, but would do great violence to the essential structure and purpose of [IGRA].

Id. at 704-705 (internal citations omitted).

In Passamaquoddy, we were presented with very different language:

The provisions of any Federal law enacted after October 10, 1980 [the effective date of the Maine Settlement Act], for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the

State of Maine . . . shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.

25 U.S.C. § 1735(b) (emphasis added). We reasoned that the Maine Settlement Act contained a savings clause that "acts as a warning signal to later Congresses to stop, look, and listen before weakening the foundation on which the settlement between Maine and the Tribe rests," and that "signals courts that, if a later Congress enacts a law for the benefit of Indians and intends the law to have effect within Maine, that intent will be made manifest." Passamaquoddy, 75 F.3d at 789. Because IGRA does not contain any indication that Congress intended it to be specifically applicable within Maine, we concluded that -- given the presence of the savings clause -- there was no conflict between the Maine Settlement Act and IGRA, and IGRA therefore did not alter that settlement act.

The Appellees seek to distinguish the present case from Narragansett because the Federal Act -- otherwise, in relevant part, essentially identical to the Rhode Island Settlement Act⁷

⁷ The relevant portion of the Federal Act reads, in full:

Except as otherwise expressly provided in this subchapter or in the State Implementing Act, the settlement lands and any other land that may now or hereafter be owned by or held in trust for any Indian tribe or entity in the town of Gay Head, Massachusetts, shall be subject to the civil and

-- ends in a parenthetical that reads, in full, "(including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance)." 25 U.S.C. § 1771g. Appellees argue that this parenthetical operates as a savings clause like the one in Passamaquoddy.

Appellees, however, misread the parenthetical. Unlike the savings clause in Passamaquoddy, the parenthetical in the Federal Act says nothing about the effect of future federal laws on the Federal Act. Rather, the parenthetical merely clarifies that, at the time of the enactment of the Federal Act, state and local gaming law applied to the Settlement Lands. We note that, at the time, there was a reason for adding this clarification (a reason that did not exist nine years earlier when the Rhode Island Settlement Act entered into force). Approximately six months before Congress passed the Federal Act on August 18, 1987, the Supreme Court decided Cabazon, 480 U.S. 202, which created

criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance).

25 U.S.C. § 1771g. Although the Federal Act is more detailed than the Rhode Island Settlement Act in terms of which lands it applies to and which local laws the Settlement Lands shall be subject to, Appellees do not argue, nor could they, that this added level of detail is relevant to the implied repeal analysis.

considerable uncertainty about Indian law, specifically with respect to gaming. See, e.g., Wisconsin v. Ho-Chunk Nation, 784 F.3d 1076, 1080 (7th Cir. 2015) ("Cabazon led to a flood of activity, and states and tribes clamored for Congress to bring some order to tribal gaming."); see also supra Section I.2. Soon after, on October 17, 1988, Congress enacted IGRA. The Federal Act was thus passed during a period of uncertainty about the status and future of Indian gaming. The parenthetical served to decrease that uncertainty by clarifying that, when the Federal Act was enacted, Commonwealth gaming law applied to the Settlement Lands, but -- just like the Rhode Island Settlement Act nine years before it -- it said nothing about the effect of future federal law.⁸

The fact that the savings clause in the Maine Settlement Act had already been on the books for some seven years when the Federal Act was enacted further confirms that Congress did not intend the Federal Act to contain such a savings clause -- for the Maine Settlement Act leaves no doubt that Congress knew how to

⁸ Appellees note that Congress amended the Rhode Island Settlement Act following our decision in Narragansett to include "[f]or purposes of [IGRA], settlement lands shall not be treated as Indian lands." 25 U.S.C. § 1708(b) (1996). Appellees argue that this means that Congress also intended the Settlement Lands in Massachusetts not to be treated as Indian lands for the purposes of IGRA. Appellees ignore an obvious fact: Congress did not amend the Federal Act.

draft a savings clause, and that the parenthetical in the Federal Act is not such a savings clause.⁹

We also reject the Appellees' argument that the Federal Act and IGRA are not in conflict because the latter only allows class II gaming where it "is not otherwise specifically prohibited on Indian lands by Federal law." 25 U.S.C. § 2710(b)(1)(A). Contrary to the Appellees' contentions, the parenthetical language included in the Federal Act is neither specific nor a prohibition. The language is hardly specific, as it appears applicable to all types of gaming and references bingo only as an example. Nor does the section prohibit anything. It merely grants Massachusetts jurisdiction over gaming. And, as the Tribe points out, even Massachusetts law does not prohibit gaming altogether. Rather, it merely regulates such gaming (e.g., by requiring a license).

⁹ The Maine Settlement Act is by no means the only example that demonstrates that Congress knows how to draft a savings clause. See Passamaquoddy, 75 F.3d at 790 ("the Court regularly has upheld and given effect to [savings clauses]" (citing Warden, Lewisburg Penit. v. Marrero, 417 U.S. 653, 659-60 n.10 (1974) (earlier statute barred repeal of certain penalties "unless the repealing Act shall so expressly provide"); Shaughnessy v. Pedreiro, 349 U.S. 48, 52 (1955) (earlier statute directed that "[n]o subsequent legislation shall . . . supersede or modify the provisions of [the earlier statute] except to the extent such legislation shall do so expressly"); Posadas v. National City Bank, 296 U.S. 497, 501 (1936) (earlier statute directed that subsequent laws "shall not apply to the Philippine Islands, except when they specifically so provide"); Great Northern Ry. Co. v. United States, 208 U.S. 452, 456 (1908) (similar); United States v. Reisinger, 128 U.S. 398, 401-02 (1888) (similar))).

Review of the legislative history confirms that this is not the type of specific prohibition that Congress had in mind. Indeed, "[t]he phrase 'not otherwise prohibited by Federal Law'" was meant to "refer[] to gaming that utilizes mechanical devices as defined in 15 U.S.C. § 1175," which the Appellees concede is not at issue here. S. Rep. No. 100-446, at 12 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3082.

IV. Conclusion

For the foregoing reasons, the opinion of the district court is reversed and the case is remanded to the district court for entry of judgment in favor of the Tribe.

Reversed and Remanded.